Deutsches Aktieninstitut

Intragroup cash management services do not constitute payment services

Provide coherence with existing European and national regulation as regards the intra-group exemption under PSD 2

Position paper on the “Targeted consultation on the review of the revised Payment services Directive (PSD2)”, 5 July 2022

Introduction

Deutsches Aktieninstitut represents companies that have centralized payment services across their group. Where the group is not subject to banking-regulation, these services are generally provided by non-regulated entities.

We very much welcome the progress recently achieved in integrating EU-wide payments. Nevertheless, we see a risk in terms of level playing field due to uncertainties among national supervisory authorities regarding the application of the intra-group exemption under PSD 2, in particular with respect to the treatment of centralized cash-management systems (e.g. payment factories).

In this regard (and so far in the existing legal environment provided by PSD 2), the interpretation of Recital 17 and the related application of Article 3 lit. (n) of Directive (EU) 2015/2366 ("**PSD 2**" or "**Directive**") has a key role.

Therefore, Deutsches Aktieninstitut suggests to review PSD 2 in order to clarify (and ensure) that a revised PSD intra-group exemption provides adequate legal certainty in line with proven comparable European legal concepts, e.g. MiFID II. Such exemption should refer to "payment services" provided / duly operated group-wide rather than "payment transactions and related services".

The proposed clarification of the PSD group exemption should also confirm that companies may provide and duly operate centralized cash management systems (and related services), including payment factories and associated incoming and/or outgoing payments of a group company which are processed centrally via another group company. Although this understanding should not be controversial, we set out in more detail below that this rather crucial question could not be answered as clearly as it seems in light of PSD 2.

1 Review and status quo under PSD 2 – relevance of centralized cash-management systems

Centralisation of domestic and cross-border payment transactions is widespread and well established across Europe (and the world). Such cash management systems are, in particular, characterized by a centralized group-wide processing of incoming and outgoing payments (so-called “payment factories” / ”shared service centres”). In practice, there is a broad variety of set ups (e.g. by implementing specific group entities for these purposes or by way of integrating a central cash-management unit into a parent or other group company).

Apart from that, centralized group cash-management systems frequently appear in other forms, e.g. in the context of “one-face-to-the-customer”-situations (e.g. with respect to leasing structures or the group-wide distribution of products). In this case, a group company may centrally receive payments by customers for services and/or products provided by other companies of the same group for intra-group onward transmission to such other involved group companies.

The central processing of payment transactions as described above does not only have organizational advantages (such as efficient execution of payments). Duly operated centralized cash-management systems also facilitate compliance with the legal requirements regarding payment transactions and the prevention of money laundering. Thus, they contribute significantly to the prevention of misuses of payment transactions. In addition, such centralisation provides transparency of a group's payment transactions as well as centralized control / monitoring of the processing of payment transactions within a group. In summary, depending on their size and the nature, scope and complexity of their business activities, companies usually not only ensure compliance with the legal requirements at a central point. They also comply with various voluntary requirements in order to ensure the integrity of the respective group.

2 PSD 2 – Legal uncertainties and purpose

The PSD 2 acknowledges the importance and particularities of group-wide payment systems. Recital 17 PSD 2 explicitly refers to "payment factories" and "collection factories" and the fact that SEPA facilitated their EU-wide creation. According to Recital 17 PSD 2 "*transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking provided by a payment service provider belonging to the same group should be excluded from the scope of this Directive*". The same applies with respect to Article 3 lit. (n) PSD 2 which exempts "*payment transactions and related services between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking*" from the scope of the Directive.

By explicitly mentioning "payment factories" or "collection factories" in Recital 17 PSD 2, which are by definition group entities which do not have a specific licence for providing payment services for the group in the sense of a "processing platform", the purpose of the exemption seems clear. However, this holds not entirely true for the second sentence of Recital 17 PSD 2 and the actual wording in Article 3 lit. (n) PSD 2, both of which also refer to a "*payment service provider [other than an undertaking][1] belonging to the same group*". The PSD 2 defines a "payment service provider" as a licensed entity like a credit institution, an electronic money institution etc. (see Article 1(1) PSD 2). Against this background it is, in particular, not entirely clear if and to what extent (and/or under which circumstances) a non-licensed group company shall be permitted to centrally process for and on behalf of other group companies incoming and/or outgoing payments from or to third parties.

We note, however, that the EU-legislator was aware that centralized cash management systems as described above tend to stabilise the system and prevent misuses of payment transactions and therefore should be exempted from the scope of PSD 2. This intention of the EU-legislator is unmistakably mentioned in Recital 17 PSD 2. In particular, sentence 3 of Recital 17 PSD 2 refers to the permission to operate a "collection factory" without the need for a licence. It states that "*the collection of payment orders on behalf of a group by a parent undertaking or its subsidiary for onward transmission to a payment service provider should not be considered to be a payment service for the purposes of this Directive*". Due to the wide range of centralized cash management systems, such reference to a "collection factory" can only serve as an example and Recital 17 PSD 2 cannot be regarded as an exhaustive list of privileged transactions.

In conclusion, the whole range of centralized cash management systems (such as the execution of payment orders for and on behalf of other group companies to

[1] Wording in Article 3 lit. (n) PSD 2 only.

third parties which is characteristic for a "payment factory") should not be regarded as a payment service within the meaning of PSD 2.

The following considerations support this interpretation:

- Either Recital 17 PSD 2 as well as Article 3 lit. (n) PSD 2 expressly refer to "*payment transactions and related services*" which we understand to be a strong indicator that the recipient of the payment services (and not the recipient of the individual payment transaction which could be a third party) needs to be a group company. Any other understanding would contradict the general objective of PSD 2 to (only) cover service providers that do offer payment services to external third parties (and not to companies of the same group only).

- If the reference to a "payment service provider" in a sense of a licensed entity is narrow interpreted, the exemption would lack its own use case: A licence would be required for entities which are aimed to be exempted from the licence requirement.

- Harmonisation achieved by the Single Euro Payments Area is a prerequisite for companies to centralise their payment services group-wide. This is to be considered a material contribution to the completion of the European single market.

- An exemption which only relates to payment flows within the group is of no value as they require payments received from or processed to external third parties. Therefore, the exemption must include payments for or by external third parties which are distributed/processed by a central cash-management system among the group members.

- Companies centralising their cash management services group-wide are, in contrast to vehicles intentionally created for abusive behaviour, verifiable compliant with the legislative requirements regarding their cash transactions.

- It is a generally acknowledged principle in the area of banking supervisory law to privilege the processing of group internal payments / services.

Provided that the relevant groups ensure compliance with the legal requirements relating to the (centralized) processing of payments we do not see any reasonable grounds that would require a different interpretation of Recital 17 / Article 3 lit. (n) PSD 2. Moreover, in our view, this interpretation / application of PSD 2 would still allow for a differentiation between different participants in the market. In other words, we do not see any objection to apply PSD 2 – in accordance with its purpose –to those market participants (only) that are subject to a risk that should

specifically be covered by PSD 2 (in particular with respect to prevention of misuses of payment transactions).

In summary, we conclude in accordance with current practice and applicable requirements that centralized cash-management systems duly operated groups through group entities (cf. para. 1 above) should be exempted from PSD 2. For the avoidance of doubt, this shall include the processing / receiving of payments to/from third parties for and on behalf of other group companies.

3 Outlook – EU-wide clarification / harmonization

In the interest of all market participants (including, for the avoidance of doubt, national legislators as well as national supervisory authorities), any future uncertainties / misunderstandings with respect to the applicability of PSD 2 to group-wide payment services provided / duly operated (in particular with respect to centralized cash-management systems as described in more detail above) should be avoided.

Therefore, the Regulation will need to be modified / renewed accordingly. The text should clearly exempt the full range of intra-group payment services that are duly operated (as described above).

In this regard, we propose to consider well-proven intra-group exemptions already provided under the European legislation as a role model, e.g. MiFID II. This would also support harmonization of European legal acts and provide legal certainty within the European Union.

Unlike now, the regulation would then be clearer and could not be (mis)understood in a manner that companies may require a license although such companies are actually aimed to be exempted from the license requirement (cf. para. 2 above).

In conclusion, the requested clarifications would prepare the grounds for a harmonised interpretation and application of the regulation. This would not only reflect the importance of intra group payment services for the European single market, but also facilitate the national implementation of the underlying EU-legislation as well as the respective interpretation by the national supervisory authorities and its application in practice.

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